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COURT OF CRIMINAL APPEALS
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PD-0790-17

IN THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
10/5/2018
DEANA WILLIAMSON, CLERK

KEITHRICK THOMAS
Appellant

vs.

THE STATE OF TEXAS
Appellee

ON DISCRETIONARY REVIEW FROM
THE FOURTEENTH COURT OF APPEALS - HOUSTON
No. 14-16-00230-CR

and on

APPEAL FROM
THE 230th DISTRICT COURT -OF HARRIS COUNTY, TEXAS
Cause No. 1454620

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE OURT OF CRIMINAL APPEALS:

COMES NOW Appellant Keithrick Thomas, pursuant to T.R.A.P 79, and brings this Motion for Rehearing. Appellant Thomas would respectfully show:

I. Resolution of the curtilage issue would add to the jurisprudence of this State.

The issue of whether an officer's intrusion on the curtilage of a home to conduct a search and seizure, without a warrant and in violation of the Fourth Amendment, should be addressed; because, this Court's resolution of that issue would certainly add to the jurisprudence of this State.

II.

The issue, though fully put forth in Appellant's Petition for Discretionary Review and Brief, was broached at the hearing, but not fully developed. At oral argument, Attorney for Appellant, Brian Wice declared, "This case requires this Court to determine whether under the plain view exception to the warrant requirement an officer's observation of nothing more than the top of a nondescript pill bottle gave her probable cause to associate that pill bottle with criminal activity and contraband so that she was free to remove it, inspect it and ultimately arrest the Appellant for a drug offense." "I don't think this Court has to reach the curtilage issue…I don't think this Court ultimately needs to reach that issue."

Clint Morgan, for the State began his argument with a request to dismiss Appellant's Petition. "…Uhhh…I hope I'm not being to forthright, but I'm going to start off by suggesting that the proper point…uhhh…the proper resolution of this case right now is to dismiss this as improvidently granted…uhhh…We have ventured very far a field from the ground this

Court granted review on which is 'Has a Fourth Amendment violation occurred, where a police officer approaches a vehicle passenger, after the passenger has exited the vehicle, and conducts a warrantless search of the passenger's pockets, in the driveway of the passenger's house?' Which seems to be some sort of curtilage issue, but at this point we've now boiled down to a fact intensive inquiry about whether…uhhh…an orange pill bottle is a prescription pill bottle and if that's the issue in front of this Court, I don't think there's anything good or useful this Court can do with that fact pattern…ummh…that would clarify the law of this State or that would help any lawyer in this state."

Appellant and undersigned counsel for Appellant would respectfully disagree with undersigned counsel's esteemed co-counsel and urge, as has been urged at every stage of the process - from trial to the Petition for Discretionary Review - that the issue of curtilage is the focal point here. The Plain View Doctrine is definitely, and has been from the onset, at play and that issue is not being waived here; nor or any of the other issues encompassed in the question set forth in Appellant's ground for review. This case however, unquestionably turns on curtilage. Appellant, would not agree, as the State indicated, that 'we have ventured far a field from the ground this Court granted review', but does agree with the State's assertion

that the curtilage issue was the driving wheel moving this Court to grant Appellant's Petition for Discretionary Review.

It would appear this Court was equally interested in the curtilage issue. At oral argument, this Court asked Attorney Wice about curtilage one time. To which Attorney Wice responded that the curtilage issue did not need to be reached. The Court addressed ADA Morgan concerning curtilage no less than three (3) times. Perhaps, because the curtilage issue was truly the reason for this Court granting Appellant's Petition for Discretionary Review. Perhaps, because it was apparent to this Court that the State believed the curtilage issue was the focal issue and, as such, was prepared with argument on the subject. Perhaps, a combination of the two.

As it turned out, the State was not able to refute the fact that the officer's encroachment on the curtilage of Appellant's home was a violation of Appellant's Fourth Amendment right to be secure in his person, house, papers, and effects, against unreasonable searches and seizure. The State's first response was that curtilage could not be addressed, because there is no "home-base immunity". The very core of the Fourth Amendment is "home-base immunity". Second, the State responded and admitted that officers cannot go onto someone's property and conduct a search, but argued if the pill bottle was in plain view, that was not a search. Finally, when the

Court reminded the State that a dog-sniff had been ruled a search, the State began to argue that a dog-sniff and the circumstances here are distinguishable, but never provided any supporting authority for this assertion or even completed the claimed point.

II. Resolution of the curtilage issue would necessarily dispense with resolution of the issue of plain view.

The seizure of an object in plain view is justified if (1) the officer is lawfully where the object can be "plainly viewed, " (2) the "incriminating character" of the object is "immediately apparent, " and (3) the officer has the right to access the object. State v. Betts, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013). Here, the State cannot prove any of the three (3) justifications that would merit extending the plain view exception. More particularly, the State is unable to overcome the very first hurdle set forth by this Court in Betts. Officer Gemmill was not lawfully where Officer Gemmill could plainly view the pill bottle that was inside Appellant Thomas' pocket.

In State v. Rendon, 477 S.W. 3d 805 (Tex. Crim. App., 2015), this Court was asked to decide whether it constitutes a search within the meaning of the Fourth Amendment for law-enforcement officers to bring a trained drug-detection dog directly up to the front door of an apartment-home for the purpose of conducting a canine-narcotics sniff. This Court answered that

it did. Consistent with the reasoning of the Supreme Court's opinion in Florida v. Jardines, 133 S.Ct. 1409 (2013), the Court concluded that the officers' use of a dog sniff at the front door of the apartment-home of Appellee Rendon resulted in a physical intrusion into the curtilage that exceeded the scope of any express or implied license, thereby constituting a warrantless search in violation of the Fourth Amendment.

The decision here in Appellant Thomas' case is inconsistent with this Court's decision in Rendon. It is immaterial whether the officer is canine or human. The end result is law enforcement physically intruding into the curtilage and exceeding the scope of any express or implied license and conducting a warrantless search in violation of the Fourth Amendment.

III. The decision of this Court is inconsistent with the United States Supreme Court decisions in Florida v. Jardines, 133 S.Ct. 1409 (2013) and Collins v. Virginia, 584 U.S. ___ (2018).

In response to being asked whether it was likely the United States Supreme Court would grant certiorari in this case, the State of Texas asserted that even though The Supreme Court has done "stranger things", the State would not bet on the Supreme Court granting certiorari. The Appellant will risk the wager that the State of Texas is wide of the mark. The Supreme Court has already granted certiorari on the curtilage issue and said a Florida trial court and a the Florida Supreme Court were right to

suppress evidence gained by was of illegal intrusion onto the curtilage of Jardines' home and Virginia was wrong in allowing an officer to trespass on the driveway of Collins' home.

A. Florida v. Jardines, 133 S.Ct. 1409 (2013)

The Fourth Amendment provides in relevant part that " [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. In Jardines, the Supreme Court explained that this text " establishes a simple baseline." Jardines, 133 S.Ct. at 1414. Namely, the Court indicated that, when " 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" Id. (quoting United States v. Jones, 565 U.S. _____, 132 S.Ct. 945, 950-51, n. 3, 181 L.Ed.2d 911 (2012)). In particular, with respect to the special constitutional protections that attach to the home, the Court observed that, when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's " very core" stands " the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the

right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

The Court further described the curtilage as the area around the home that is "'intimately linked to the home, both physically and psychologically, '" and is where "'privacy expectations are most heightened.'" Id. at 1415 (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)). The Court discussed the fact that, although the boundaries of the curtilage are generally "'clearly marked, ' the 'conception defining the curtilage' is at any rate familiar enough that it is 'easily understood from our daily experience.'" Id. [quoting United States v. Oliver, 466 U.S. 170, 182 n. 12 (1984)]. In Jardines, where the search occurred on the front porch of a private house, the Court easily resolved the matter of whether that area was included within the curtilage, stating that "there is no doubt that the officers entered [the curtilage]: The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" Id.

B. Collins v. Virginia, 584 U.S. ___ (2018).

In Collins v. Virginia, 584 U.S. ___ (2018), an officer invaded the driveway of Collins' home and lifted the cover off of a motorcycle to determine whether the motorcycle was the same motorcycle that officers believed to be stolen and that had previously eluded officers in two (2)

separate instances where officers chased the operator of the motorcycle. The Court narrowed the question to whether the automobile exception justifies the invasion of the curtilage. The Court answered no. The automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein. Collins v. Virginia, 584 U.S. ___ (2018).

The Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals." Collins v. Virginia, 584 U.S. ___ (2018) quoting Florida v. Jardines, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " Ibid. (quoting Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home' "—to be " 'part of the home itself for Fourth Amendment purposes.' " Jardines, 569 U.S., at 6, 133 S.Ct. 1409 (quoting Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both

physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207, 212–213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Jardines, 569 U.S., at 11, 133 S.Ct. 1409. Such conduct thus is presumptively unreasonable absent a warrant. The " 'conception defining the curtilage' is ... familiar enough that it is 'easily understood from our daily experience.' " Jardines, 569 U.S., at 7, 133 S.Ct. 1409 (quoting Oliver, 466 U.S., at 182, n. 12, 104 S.Ct. 1735). Just like the front porch, side garden, or area "outside the front window," Jardines, 569 U.S., at 6, 133 S.Ct. 1409, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes "an area adjacent to the home and to which the activity of home life extends,' " and so is properly considered curtilage, id., at 7, 133 S.Ct. 1409 (quoting Oliver, 466 U.S., at 182, n. 12, 104 S.Ct. 1735). In physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, i.e., the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home. Collins v. Virginia, 584 U.S. ___ (2018).

"Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not." Collins v. Virginia, 584 U.S. ___ (2018).

Imagine, here, Appellant Thomas had made it inside Appellant Thomas' house. Imagine Officer Gemmill or any other passerby could see Appellant Thomas sitting on the sofa in the living room. Imagine further that Officer Gemmill had probable cause to believe that Appellant Thomas possessed illegal drugs. Can Officer Gemmill, acting without a warrant, enter the house to search Appellant Thomas, discover a pill bottle in his pocket, open the pill bottle and confirm whether there is Xanax in the pill bottle? Surely not.

IV. Conclusion

WHEREFORE PREMISES CONSIDER, Appellant prays that this Court grant Appellant's Motion for Rehearing, reverse Appellant's conviction and for all other relief to which Appellant is entitled at law and in

equity.

Respectfully submitted,

/s/ NWestbrooks

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served on Clint Morgan, Assistant District Attorney CM/ECF Filing System on October 4, 2018.

/s/ NWestbrooks
Nicolette Westbrooks

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion is on substantial intervening circumstances or on other significant circumstances, which are specified in this motion. I further certify that this motion is made in good faith and not for the purpose of delay.

/s/ NWestbrooks
Nicolette Westbrooks

CERTIFICATE OF WORD COUNT

I certify that the pertinent portions of this motion contain approximately 2,524 words.

/s/ NWestbrooks
Nicolette Westbrooks